FILE COPY

Office Supreme Court
JAN 22

No. 114

In the Supreme Court of the United States

OCTOBER TERM, 1930

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	5
Argument:	8
I. The article diverted to beverage purposes was distilled spirits subject to tax under section 600 (a) of the revenue act of 1918, as amended	8
II. The tax imposed in this case under section 600 (a) of the revenue act of 1918, as amended, is within the contemplation of sections 3257 and 3281 of the Revised Statutes	10
III. Sections 3257 and 3281 of the Revised Statutes were not repealed by sections 25 and 22, Title II, of the national prohibition act	13
IV. The present proceedings are not barred because of the conviction of the Waterloo Distilling Corporation and others for conspiracy to violate the national prohibition act	16
V. The decree did not include premises which were not properly subject to forfeiture	19
Conclusion	21
Appendix	22

CITATIONS

Cases:

Commercial Credit Company v. *United States*, 276 U. S. 226	16, 17
Gavieres v. *United States*, 220 U. S. 338	15
Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94	21
Goldsmith-Grant Co. v. *United States*, 254 U. S. 505	19
Lipke v. *Lederer*, 259 U. S. 557	10, 11
McCarthy v. *Arndstein*, 262 U. S. 355	21
Morgan v. *Devine*, 237 U. S. 632	15
Murphy v. *United States*, 272 U. S. 630	12
Regal Drug Co. v. *Wardell*, 260 U. S. 386	10, 11
United States v. *Austin-Bagley Corporation*, 31 F. (2d) 229	4, 16, 18
United States v. *One Ford Coupe*, 272 U. S. 321	6, 12–13, 15

Cases—Continued. Page
United States v. *One Ice Box*, 37 F. (2d) 120 19
United States v. *Rabinowich*, 238 U. S. 78 17
United States v. *Stafoff*, 260 U. S. 477 ..... 6, 15
United States v. *385 Barrels, etc., of Wine*, 300 Fed. 568 19
United States v. *Yuginovich*, 256 U. S. 450 ..... 6, 15
Western Electric Co. v. *Splitdorf Co.*, 264 U. S. 463 21
Statutes:
Revised Statutes—
Sec. 3257 (U. S. C., title 26, sec. 261) 22
Sec. 3281 (U. S. C., title 26, sec. 306) 22–23
National prohibition act, c. 85, Title II, 41 Stat. 305, 314, 315—
Sec. 22 (U. S. C., title 27, sec. 34) 25–26
Sec. 25 (U. S. C., title 27, sec. 39) 26–27
Revenue act of 1918, as amended (c. 27, sec. 900, 44 Stat. 9, 104; U. S. C., title 26, sec. 245)—
Sec. 600 (a) 23–24
Willis-Campbell Act, c. 134, 42 Stat. 222, 223, sec. 5 (U. S. C., title 27, sec. 3) 24–25

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 114

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE Waterloo Distilling Corporation et al., petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The charge of the District Court to the jury is set forth at pages 157 to 172 of the record. The opinion of the Circuit Court of Appeals (R. 191) is reported in 40 F. (2d) 422.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 21, 1930. (R. 197.) The petition for certiorari was filed May 14, 1930, and was granted October 13, 1930. (R. 198.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether alcohol which has been diverted to beverage purposes after having been specially denatured to facilitate such diversion is subject to the tax imposed by Section 600 (a) (4) of the Revenue Act of 1918, as amended, upon distilled spirits diverted to beverage purposes.

2. Whether such "tax" is a penalty and therefore not within the contemplation of Sections 3257 and 3281 of the Revised Statutes, which provide for the forfeiture of the distillery of any distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or who engages in such business with intent to defraud the United States of such tax.

3. Whether Sections 3257 and 3281 of the Revised Statutes are directly in conflict with Sections 25 and 22, Title II, of the National Prohibition Act, and, therefore, impliedly repealed by that Act.

4. Whether the prior conviction of the distiller of conspiracy to violate the National Prohibition Act bars the present suit to forfeit the distillery.

5. Whether certain premises were properly included in the judgment of forfeiture.

STATUTES INVOLVED

These are set forth in the appendix to this brief, pp. 22–27, *infra*.

STATEMENT

This was a libel by the United States to forfeit a distillery, a warehouse, and a denaturing plant

at Waterloo, New York. The libel charged in its first and second counts that between October 1, 1926, and March 1, 1927, the Waterloo Distilling Corporation had carried on the business of a distiller upon the libeled premises with intent to defraud the United States of the tax on the spirits distilled; that during the same period, it had attempted to defraud and had defrauded the United States of such tax, and that in consequence of these acts the property libeled had become forfeited to the United States under Sections 3281 and 3257 of the Revised Statutes. The fraud alleged consisted of the withrawal of alcohol, ostensibly for nonbeverage but actually for beverage purposes, without payment of the tax imposed by Section 600 (a) of the Revenue Act of 1918, as amended, upon distilled spirits diverted to beverage purposes. (R. 2–5.) A third count, drawn under Section 3453 of the Revised Statutes, was dismissed on stipulation. (R. 5–6, 17.) An answer to the libel was filed by the Waterloo Distilling Corporation, one of the petitioners, denying the allegations of the libel in so far as it charged any violation of law. (R. 7–10.) Answers were also filed by the Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, petitioners here, claiming title to parts of the libeled property. R. 10–14.)

Before the taking of any testimony the respondents [petitioners here] moved to dismiss the libel on the ground that the Government had previously elected to proceed against the Waterloo Distilling

Corporation and others upon the charge of conspiracy to violate the National Prohibition Act (see *United States* v. *Austin-Bagley Corporation*, 31 F. (2d) 229) and was accordingly barred from proceeding to forfeit the property of that corporation "under the Internal Revenue Laws." The motion was denied. (R. 22–23.)

At the trial the Government introduced evidence tending to establish that from October, 1926, to March, 1927, the Waterloo Distilling Corporation was operating an industrial alcohol plant, a bonded warehouse, and a denaturing plant at Waterloo, New York, under Government permits (R. 25–26); that during this period it had withdrawn large quantities of alcohol from its bonded warehouse, ostensibly for complete denaturation at its denaturing plant, but that it had in fact only specially denatured such alcohol and had thereupon shipped it under false billings to fictitious consignees so that it might be "cleaned" and made fit for beverage purposes. (R. 47–54, 94–96.)

The jury returned a verdict in favor of the libelant (R. 172) and judgment was entered declaring the libeled property forfeited to the United States. (R. 19–20.) Upon appeal the judgment was affirmed (R. 197) and thereafter this Court granted a writ of certiorari (R. 198).

The petitioner contends: (1) That the article diverted to beverage purposes was not "distilled spirits," but denatured alcohol, which is not subject

to tax under Section 600 (a) of the Revenue Act of 1918, as amended; (2) that the "tax" imposed by Section 600 (a) is a *penalty* and therefore the provisions of Sections 3257 and 3281 of the Revised Statutes, forfeiting property of a distiller who defrauds or attempts to defraud the United States of a *tax*, or who engages in such business with intent to defraud the United States of a *tax*, have no application to the instant suit; (3) that Sections 3257 and 3281 are, respectively, in direct conflict with Sections 25 and 22, Title II, of the National Prohibition Act, and were therefore impliedly repealed by that Act; (4) that as the Waterloo Distilling Corporation and others had previously been indicted and convicted on the charge of conspiring to violate the National Prohibition Act because of certain of the transactions involved in the instant case, the Government was barred from proceeding to forfeit the distillery of that company under Sections 3257 and 3281 of the Revised Statutes, and (5) that certain land outside the bonded premises was erroneously included in the judgment of forfeiture.

SUMMARY OF ARGUMENT

The article diverted was the *pure alcohol*, which was withdrawn from bond for the purpose of being denatured and disposed of to purchasers to be "cleaned" and ultimately used for beverage purposes. The diversion was therefore of distilled spirits subject to tax under Section 600 (a) of the Revenue Act of 1918, as amended.

In *United States* v. *One Ford Coupe*, 272 U. S. 321, it was held that the basic tax of $2.20 a gallon imposed upon the production of distilled spirits by Section 600 (a) is a true tax whether the spirits are legally or illegally produced. As that same basic production tax is included in the "tax" of which the distillery in the present proceedings is alleged to have defrauded, or attempted to defraud, the United States, it is clear that a portion, at least, of the impositions here involved is a true tax and hence within Sections 3257 and 3281.

Sections 3257 and 3281 of the Revised Statutes are not in direct conflict, respectively, with Sections 25 and 22, Title II, of the National Prohibition Act and hence were not impliedly repealed by that Act. The statutes said to conflict were enacted for different purposes and cover different ground. Sections 3257 and 3281 were designed to enforce payment of taxes on the manufacture of liquor, whereas Sections 22 and 25 were intended to prevent the manufacture and use of liquor for beverage purposes. Moreover, Section 3281 was specifically held in *United States* v. *Stafoff*, 260 U. S. 477, to have been reenacted by the Willis-Campbell Act, and Section 3257, which had been held repealed in *United States* v. *Yuginovich*, 256 U. S. 450, was clearly included among the statutes described in the *Stafoff case* as reenacted by the Willis-Campbell Act.

The prior conviction of the Waterloo Distilling Corporation of conspiracy to sell alcohol in violation of the National Prohibition Act does not bring the present suit within Section 5 of the Willis-Campbell Act, which provides that where an act is a violation of the prior laws relating to liquor and also of the National Prohibition Act a "conviction" for such act or offense under the one shall bar a "prosecution" therefor under the other. The prior conviction was for conspiracy in violation of Section 37 of the Criminal Code. There has been no conviction for any act or offense under the National Prohibition Act. If this were not so, still there is no identity even in the substantive offenses. Illegally selling liquor is not at all the same offense as carrying on the business of a distiller with intent to defraud the United States of a tax. Furthermore, the bar of Section 5 is against a "prosecution" after there has been a "conviction." The present suit is not a "prosecution."

The petitioners' final contention, that an island adjacent to the distillery was erroneously included in the judgment of forfeiture because not a part of the bonded premises or used as a means of ingress thereto or egress therefrom, is not sustained by the record. Moreover, we do not believe this question is properly before this Court since it was not urged before or passed upon by the court below and was not included in the Specification of Errors in the petition for a writ of certiorari.

34251—31——2

ARGUMENT

I

THE ARTICLE DIVERTED TO BEVERAGE PURPOSES WAS DISTILLED SPIRITS SUBJECT TO TAX UNDER SECTION 600 (A) OF THE REVENUE ACT OF 1918, AS AMENDED

Because the pure alcohol which was withdrawn by the distiller from its bonded warehouse was first specially denatured, and hence made unfit to drink, before being disposed of to purchasers (with the object, as must be presumed to have been found by the jury, that it should be "cleaned" and ultimately used for beverage purposes), the petitioners contend that the diversion was not of "distilled spirits" but of denatured alcohol and that accordingly the tax imposed by Section 600 (a) of the Revenue Act of 1918, as amended (pp. 23–24, *infra*), could not apply. We answer that the diversion to beverage purposes began when the alcohol was withdrawn with the intent that it should ultimately be used for beverage purposes, and that the denaturation was but a step in such diversion.

The trial court charged the jury:

> * * * in order to find for the Government * * * you must find that the distillery did put out alcohol, intending that that alcohol shall be used for an illegitimate purposes, and for beverage purposes; and if you find that the distillery did divert its

> alcohol from its legitimate business, and did convey it into channels in which it would be used for beverage purposes, then you have found that the distillery has sent out from its plant distilled spirits which were subjected to a tax by the Government, which was not paid; * * * (R. 165.)
>
> * * * * *
>
> * * * if you say you find for the Government, you find that this particular distillery carried on its business with intent to defraud the Government, and by defrauding the Government, it means that they put out from their distillery a product *which could be used, intended to be used for the making of a beverage* * * *. (R. 167.) (Italics ours.)

The Government does not contend, as the petitioners assert, that specially denatured alcohol is "liquor" or that it is "potable." It does contend that specially denatured alcohol may be made potable and fit for beverage purposes, and that, under the instructions given, the jury must be regarded as having so found with respect to the article involved in the instant case. As the jury found, the "diversion" was of alcohol, admittedly "distilled spirits," and the diversion began when the alcohol was withdrawn from the bonded warehouse with the intent that it should be ultimately used for beverage purposes.

II

THE TAX IMPOSED IN THIS CASE UNDER SECTION 600 (a) OF THE REVENUE ACT OF 1918, AS AMENDED, IS WITHIN THE CONTEMPLATION OF SECTIONS 3257 AND 3281 OF THE REVISED STATUTES

The petitioners cite *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Co.* v. *Wardell*, 260 U. S. 386, as establishing that the "tax" imposed by Section 600 (a) of the Revenue Act of 1918, as amended, is a "penalty," and from this they argue that the defrauding or attempting to defraud of such "tax" by a distiller, or the engaging in the business of a distiller with the attempt to defraud thereof, are acts not within Sections 3257 and 3281 of the Revised Statutes. (*Infra*, pp. 22–23.)

The cases cited declare that where a "tax" is imposed upon dealings which are made criminal by law and the essential purpose of the "tax" is that of "punishment for infraction of the law," such an imposition, though called a tax, is in reality a penalty and can not be lawfully collected by distraint upon an assessment made without notice and hearing given the person called upon to pay it.

Thus the *Lipke case* held that the so-called "double tax" imposed by Section 35, Title II, of the National Prohibition Act upon the illegal manufacture or sale of liquor is a penalty rather than a tax.

The same conclusion was reached in the *Regal Drug Co. case* with respect to the tax of $6.40 imposed by Section 600 (a) of the Revenue Act of

1918, *but only in so far as the tax of $6.40 exceeded the basic tax of $2.20 imposed by that section.* Section 600 (a) imposed a tax of $2.20 per gallon "on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States." (c. 18, 40 Stat. 1057, 1105.) In the *Regal Drug Co. case* this tax of $2.20 had been paid by the distiller (260 U. S. 386, 388, 389; see also the record in that case, No. 108, October Term, 1922, pp. 4–5, 7), and the taxing authorities were endeavoring to collect only the sum of $4.20 per gallon, the difference between the tax paid upon the lawful withdrawal of the distilled spirits and the total tax of $6.40 imposed by Section 600 (a) when the distilled spirits were diverted to beverage purposes.

In the instant case no taxes under Section 600 (a) have been paid and the amount charged by the taxing authorities against the petitioners is the entire tax of $6.40. This sum by the express terms of Section 600 (a) (4), p. 24, *infra*, includes the underlying or basic tax of $2.20 which is exacted *for dealings which may be permissible and lawful.* Neither the *Lipke case* nor the *Regal Drug Co. case* decides that *this* part of the sum of $6.40 is not a real tax. While there may be some doubt as to the limits of the rule of the *Lipke* and *Regal Drug Co. cases,* in view of the subsequent statement of this Court that "a tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the

main purpose in retaining the tax is to make law-breaking less profitable" (*United States* v. *One Ford Coupe*, 272 U. S. 321, 328, and see *Murphy* v. *United States*, 272 U. S. 630, 631–632), this Court has expressly held that to the extent that the total tax set forth in Section 600 (a) (4) represents an imposition which may be incurred without violating the law, it is a real tax and not a penalty. *United States* v. *One Ford Coupe*, *supra*, p. 328.

In the *One Ford Coupe case* the Government brought proceedings to forfeit an automobile under Section 3450 of the Revised Statutes, which provides for the forfeiture of vehicles used for the removal, deposit, or concealment of commodities with intent to defraud the United States of the "tax" thereon. It was contended that that statute had no application where the commodity involved was illicit liquor because upon the passage of the National Prohibition Act what had theretofore been a tax on such liquor ceased to be such and became a penalty. Overruling the contention, this Court said (p. 328):

> What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer*, 259 U. S. 557, 561, was the so-called double tax. *Here, we are dealing with the basic production tax.*
>
> With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the

> product of legal and illegal distillation. *The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled,* and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. *The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it. It is a tax within the meaning of Section 3450* * * *. (Italics ours.)

Obviously, if the basic tax of $2.20 a gallon imposed by Section 600 (a) is a tax within the meaning of Section 3450, it is likewise a tax within the meaning of Sections 3257 and 3281. As such basic tax is included in the "tax" upon which the present forfeiture proceedings are based, it follows that a portion, at least, of the impositions here involved is a true tax and hence within the provisions of Sections 3257 and 3281.

III

SECTIONS 3257 AND 3281 OF THE REVISED STATUTES WERE NOT REPEALED BY SECTIONS 25 AND 22, TITLE II, OF THE NATIONAL PROHIBITION ACT

The petitioners assert that Sections 3257 and 3281 were impliedly repealed by the National Pro-

hibition Act and were not reenacted by the Willis-Campbell Act because they were in direct conflict, respectively, with Sections 25 and 22, Title II, of the National Prohibition Act. Section 25, pp. 26–27, *infra*, declares it to be unlawful to possess any liquor, or property designed for the manufacture of liquor, intended for use in violating Title II of the Act, and provides that if it is found that such liquor or property is unlawfully possessed it shall be destroyed unless the court shall otherwise order. Section 3257, on the other hand, p. 22, *infra*, provides for the punishment of any distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, by fine and imprisonment and by forfeiture of the distillery and materials found therein. Section 22, pp. 25–26, *infra*, provides for the abatement of liquor nuisances and the closing of premises upon which they are maintained, whereas Section 3281, pp. 22–23, *infra*, provides punishment by fine and imprisonment and for the forfeiture of property of the distiller who conducts his business without giving bond as required by law or with intent to defraud the United States of the tax on the spirits distilled by him.

The statutes alleged to be in direct conflict were enacted for different purposes and occupy different fields. Sections 3257 and 3281 of the Revised Statutes were designed to enforce the payment of taxes on the manufacture of liquor. Sections 22

and 25 of Title II of the National Prohibition Act were intended to prevent the manufacture and use of beverage liquor. Sections 3257 and 3281 R. S. require as an essential element of the offenses there dealt with an attempt or intent to defraud the United States of a tax. No such attempt or intent is involved in the offenses dealt with by Sections 22 and 25. That parts of the same transaction are punishable under both laws does not establish direct conflict between them. *United States* v. *One Ford Coupe*, 272 U. S. 321, 330–331. The offense under each is unquestionably distinct. See *Morgan* v. *Devine*, 237 U. S. 632; *Gavieres* v. *United States*, 220 U. S. 338.

Moreover, Section 3281 was among the statutes which this Court specifically held in *United States* v. *Stafoff*, 260 U. S. 477, had been reenacted by the Willis-Campbell Act; and Section 3257, which had been specifically held repealed in *United States* v. *Yuginovich*, 256 U. S. 450, was, we submit, clearly included among the statutes referred to in the following language of the *Stafoff case* (p. 480):

> But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms.

IV

THE PRESENT PROCEEDINGS ARE NOT BARRED BECAUSE OF THE CONVICTION OF THE WATERLOO DISTILLING CORPORATION AND OTHERS FOR CONSPIRACY TO VIOLATE THE NATIONAL PROHIBITION ACT

The petitioners next contend that the present proceedings are barred because of the prior conviction of the Waterloo Distilling Corporation and others for conspiracy to violate the National Prohibition Act. (See *United States* v. *Austin-Bagley Corporation*, 31 F. (2d) 229.) It is first suggested that the provisions relating to penalties and forfeitures in the National Prohibition Act are in direct conflict with such provisions in the prior internal revenue laws and that since the Government elected to proceed originally under the National Prohibition Act by way of the indictment for conspiracy, any suits for penalties or forfeiture of the property involved in the conspiracy must be brought *under that Act*. For this conclusion *Commercial Credit Company* v. *United States*, 276 U. S. 226, is cited. It is further contended that the prior conviction of the Distilling Corporation bars the present proceeding because of the provision of Section 5 of the Willis-Campbell Act, pp. 24–25, *infra*, that where an act is a violation of any laws relating to liquor "that were in force when the National Prohibition Act was enacted" and also of the National Prohibition Act, a conviction for such act under one shall bar a "prosecution" therefor under

the other. These contentions are likewise untenable.

In point III, *supra*, we have answered the contention that Sections 3257 and 3281 of the Revised Statutes are in direct conflict, respectively, with Sections 25 and 22, Title II, of the National Prohibition Act, and are unable to find in the *Commercial Credit Company case* any authority for the proposition that once punitive proceedings have been instituted by the Government for an offense under the National Prohibition Act, thereafter any punitive proceedings for *other offenses*, if any, arising out of the same general transactions must be instituted *under that Act*.

The prior conviction relied upon was for conspiracy in violation of *Section 37 of the Criminal Code*. (R. 21–23.) True, the conspiracy was to sell alcohol for beverage purposes in violation of the National Prohibition Act, but the conviction was not "under" the National Prohibition Act but "under" the Criminal Code. The distinction between a conspiracy to commit an offense and the actual commission of the offense itself was pointed out by this Court in *United States* v. *Rabinowich*, 238 U. S. 78, where the question involved was whether an indictment charging a conspiracy to commit an offense under the Bankruptcy Act came within the provision of Section 29 (d) thereof lim-

iting to one year a prosecution "for any offense arising under this Act." Answering that question in the negative, this Court said (pp. 85–86):

> It is apparent from a reading of § 37, Crim. Code (§ 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. * * * The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. * * * And it is punishable as conspiracy, though the intended crime be accomplished. * * *

It is plain, therefore, that the prior conviction of the Waterloo Distilling Corporation was not under the National Prohibition Act and that the bar of Section 5 of the Willis-Campbell Act has no application to the present suit.

If this were not so, still there is no identity even in the substantive offenses within the meaning of Section 5. The offense of selling liquor (see *United States* v. *Austin-Bagley Corporation*, 31 F. (2d) 229, 230, *supra*), is not the same offense as carrying on the business of a distiller with intent to defraud of a tax. The acts and offenses involved are dissimilar. In other words, the present proceeding is not based upon the same act for which the prior conviction was had.

Furthermore, the bar of Section 5 is against a "prosecution" after there has been a "conviction." Taken in their natural sense, the words quoted apply to criminal proceedings and indicate that the purpose of Congress in enacting the provision in question was to prevent a person from being subjected for the same act to two criminal prosecutions, although brought under different laws. It would be an extension of the ordinary meaning of its language to hold that the statute applies to civil proceedings *in rem* to forfeit property, which itself, as distinguished from its owner, is regarded as the real offender. *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505; *United States* v. *One Ice Box*, 37 F. (2d) 120, 124 (N. D. Ill.); *United States* v. *385 Barrels, etc., of Wine*, 300 Fed. 565 (S. D. N. Y.).

V

THE DECREE DID NOT INCLUDE PREMISES WHICH WERE NOT PROPERLY SUBJECT TO FORFEITURE

The petitioners finally contend that the decree of forfeiture improperly included certain property owned by the Waterloo Distilling Corporation which was not "bonded" and hence was not part of the "distillery premises." This property is described only as "an island * * * adjacent to the distillery premises." It is asserted that this island was not described in the application of the distilling corporation for its permit to operate a distillery and that it is not described in the permit.

No record references are given in support of these assertions. (See Pet. Br. 34–35.)

The record contains references to a "Watkins Island" upon which the petitioner's bonded warehouse and denaturing plant were located. (R. 13, 14, 28–29.) The record also shows that the "bonded premises" included "the distillery building, the bonded warehouse building and the denaturing plant." (R. 30.) Section 3281 of the Revised Statutes provides that the forfeiture shall extend to "the lot or tract of land on which such distillery is situated" and the premises "used for purposes of ingress or egress to or from such distillery." (*Infra*, pp. 22–23.) Clearly the foregoing evidence that the distillery warehouse and denaturing plant were located upon the island is not overcome by the fact that the distilling corporation failed to include a description of the island in its application for a permit.

Moreover, we do not believe that the contention of the petitioners is properly before this Court. No instructions to the jury on the question of whether any property was improperly included in the libel were asked or given. (R. 157–172.) Although the petitioners included in their numerous assignments of error the denial by the trial court of motions to dismiss the libel (R. 185, 187) "as to all real property outside the bonded premises, except the part outside such bonded premises, if any, as was used by the Waterloo Distilling Corporation for purposes of ingress and egress"

(R. 110, 173), no reference whatever was made thereto in the briefs filed by the petitioners in the Circuit Court of Appeals, and the point was not passed upon by that court.

In the petition for certiorari filed in this Court, the point was included in the enumeration of questions said to be involved, but it was not included in the "Specification of Errors" and no mention was made of it in the brief accompanying the petition.

This Court has held that it will not consider questions, not jurisdictional or otherwise fundamental, which were not presented for the consideration of the lower court. *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 98–99. See *McCarthy* v. *Arndstein*, 262 U. S. 355, 360. Nor will this Court consider questions not raised by the petition for a writ of certiorari. *Webster Electric Co.* v. *Splitdorf Co.* 264 U. S. 463.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE,
PAUL D. MILLER,
Attorneys.

JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

Section 3257 of the Revised Statutes (U. S. C., Title 26, Sec. 261) provides:

> Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits, and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Section 3281 of the Revised Statutes (U. S. C., Title 26, Sec. 306) provides:

> Every person who carries on the business of a distiller without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding

> of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Section 600 (a) of the Revenue Act of 1918, as amended (*c.* 27, Sec. 900, 44 Stat. 9, 104; U. S. C., Title 26, Sec. 245), provides, so far as material here:

> SEC. 600 (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

(1) Until January 1, 1927, $2.20 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon;

* * * * *

(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), provides:

That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties pro-

vided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

Section 22, Title II, National Prohibition Act, c. 85, 41 Stat. 305, 314 (U. S. C., Title 27, Sec. 34), provides:

> An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall

be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

Section 25 of the same Title (U. S. C., Title 27, Sec. 39) provides (p. 315):

It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court

shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

U. S. GOVERNMENT PRINTING OFFICE: 1931